BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioner submits that the Circuit Court of Appeals has failed to apply properly applicable local decisions within the requirements of Section 34 of the Judiciary Act of 1789, 28 U. S. C. A., Section 725, as enunciated by the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and further explained in *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Six Companies* v. *Highway Distrist*, 311 U. S. 180; *Moore* v. *Illinois Central R. Co.*, 311 U. S. 643. It does not appear affirmatively on the face of the opinion below (R. 137) that the Circuit Court of Appeals refused to apply applicable local decisions and substituted its own interpretation of said decisions based on *obiter dicta*. However, this fact is not important if a proper analysis of this opinion shows that such was actually done. See: *Wichita Royalty Co.* v. *City National Bank, supra, Six Companies* v. *Highway District, supra.*

Summary of Argument.

I. The Circuit Court of Appeals' interpretation and application of the judgment of ouster entered by the Circuit Court of Dade County, Florida, in *State ex rel. Landis et al.* v. *Mahood* is wholly unwarranted. An analysis of the information and judgment in that case clearly indicates that it was not only held that the officers of the pretended town were ousted from exercising powers over lands east of the Biscayne Bay but that they were also ousted from exercising the offices and franchises of a municipality over lands west of Biscayne Bay.

II. The Circuit Court of Appeals, holding that there is a municipal corporation *de facto* as to lands west of Biscayne Bay is contrary to applicable local decisions. It is well established law in Florida that an original attempt to incorporate under one municipal government two non-contiguous tracts of land is unauthorized and void. Here was such an attempt and the same is void *ab initio* as to all lands included in the original attempt to incorporate—lands on the east and the west sides of Biscayne Bay.

III. The Circuit Court of Appeals, holding that there is a municipal corporation *de facto* as to the lands west of Biscayne Bay is based on *obiter dicta* in conflict with adjudicated legal principles and inapplicable to the issue involved. Although Florida decisions hold that there can be no municipality *de facto* where there can be none *de jure* and that an original attempt to incorporate under one government two non-contiguous tracts of land is unauthorized and void, there is *obiter dicta* to the effect that because of judicial and legislative recognition and the exercising of municipal functions, petitioner is a *de facto* municipal corporation as to lands west of Biscayne Bay. This *dicta* was originally advanced in a decision of the Circuit Court of Appeals and later repeated by the Supreme Court of Florida. It is urged that such *dicta* should not be the basis of decision of the Federal Court in the instant case because such is wholly unreliable. Furthermore, such *dicta*, even if binding on a Federal Court, is inapplicable in the instant case for the net result is an absurdity, namely, the establishment of a *de facto* municipal corporation by legislative and judicial recognition and the exercising of municipal functions is given retroactive effect—validating bonds issued prior to such legislative and judicial recognition and the exercising of municipal functions as would give rise to a *de facto* municipality.

ARGUMENT.

I. The Circuit Court of Appeals' interpretation and application of the judgment of ouster entered by the Circuit Court of Dade County, Florida, in State ex rel. Landis et al. v. Mahood, is wholly unwarranted.

The Circuit Court of Appeals by holding that the judgment of ouster of the Circuit Court of Dade County, Florida, in *State ex rel. Landis et al.* v. *Mahood et al.* (R. 28; Defendant's Exhibit B), which was construed by this Court in *Ocean Beach Heights, Inc.* v. *Brown-Crummer Investment Company,* 302 U. S. 614, "did not purport to nullify the municipality or oust its officers wholly, but only as to the part of the town east of the Bay" (R. 139), gives the judgment a construction which is in conflict with the language used.

The *jurisdictional fact set up in the information* in *quo warranto* (R. 19; Defendant's Exhibit A), upon which the State of Florida sought to require the Town of North Miami (formerly Miami Shores) "a pretended municipal corporation, to answer to said State by what warrant or authority of law" it was usurping to be a municipal corporation and was exercising the offices, franchises, liberties, and powers of a municipality (R. 27), and the one upon which the Circuit Court of Dade County, Florida, predicated its judgment *was that the alleged incorporation consisted of an effort to incorporate two distinct detached tracts of land, as corporate territory, under one government,* one on the east side and the other on the west side of Biscayne Bay (R. 24).

The Town by its answer denied these allegations. Upon the issue thus formed the jury found for the relator and corelator and the judgment entered thereon did two things:

First: It adjudged that the officers of the Town of North Miami and the Town of North Miami "be and they

each are hereby ousted, excluded and prohibited from exercising the offices, franchises and privileges of a municipality or municipal corporation" (R. 29); and

Second: To meet the requirements and needs of co-relators who were landowners on the east side, the judgment then ousted and excluded the mayor, councilmen, tax collector, clerk and town marshal from exercising the offices and franchises of a municipality over and upon the lands east of Biscayne Bay (R. 29-30).

Therefore, the language of the information and the judgment based thereon shows that said judgment did purport to do more than to oust the officers from exercising the offices and franchises of a municipality east of the bay. The jurisdictional fact alleged in the *quo warranto* proceedings was not such a fact as permitted or laid the foundation for a partial ouster. Under the facts alleged and proven, a complete ouster was not only proper but it was the only judgment by which the lands on the east side could be excluded.

In all litigation between the same parties or their privies, the estoppel extends, not only to what was decided, but to all that was necessarily involved in the issue or essential to the decision made. *Wiggins Ferry Company* v. *Ohio and Mississippi Ry. Co.*, 142 U. S. 396, *Nalle* v. *Oyster*, 230 U. S. 165, 181, *Block* v. *Board of County Commissioners*, 99 U. S. 686.

In addition, the fact that the *quo warranto* proceeding was a direct proceeding instituted in the name of the State of Florida by its Attorney General, Meredith, and the other respondents here, as well as the entire public, are regarded as being represented and are bound by the judgment rendered.

People ex rel. Chilcoat v. *Harrison*, 253 Ill. 625.

Therefore, the Circuit Court of Appeals in the instant case should have held that the said judgment of ouster

conclusively determined the rights of the parties in this proceeding, and the motion for summary judgment should have been denied.

II. The Circuit Court of Appeals' holding that there is a municipal corporation de facto as to lands west of Biscayne Bay is contrary to applicable local decisions.

In *Enterprise* v. *State,* 29 Fla. 128, the Supreme Court of Florida held that the Constitution and the Statutes of Florida, under which the attempt in 1926 to incorporate the Town of North Miami was made, did not permit the incorporation of disconnected tracts of land under one government, found a part of the territory proposed to be incorporated to be disconnected from the other part where the village was located, just as in the present case, and declared (p. 145):

> "An attempt to incorporate two distinct detached tracts of land as corporate territory under one government, is unauthorized and void."

In *Mahood* v. *State ex rel. Davis,* 101 Fla. 1254, the Supreme Court of Florida examined the information in *quo warranto* challenging the legal existence of the Town of North Miami, and remanded the case for trial of the issue whether the purported town actually included two detached tracts of land, declaring, on the basis of *Enterprise* v. *State, supra,* that under the Statutes of Florida there could be no municipal government embracing two detached tracts of land.

In *Leatherman et al.* v. *Alta Cliff Company, et al.,* 114 Fla. 305, a case instituted by landowners on the east side of Biscayne Bay, the Supreme Court of Florida held that the statutes did not authorize citizens within a village to create a municipality embracing the village and including territory not connected with the village, applied the judg-

ment of ouster (R. 29) rendered pursuant to *Mahood* v. *State ex rel. Davis, supra,* and held that tax certificates issued by said municipality against lands on the east side of Biscayne Bay were null and void.

In *Ocean Beach Heights, Inc., et al.* v. *Brown-Crummer Investment Company, et al.,* 87 Fed. (2d) 978, the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the United States District Court enjoining the *Leatherman* case, *supra,* from being applied to taxes levied against east side lands for the purpose of paying one of the judgments involved in the present proceeding, dated June 19, 1931, recovered on certain general improvement bonds issued by said pretended municipality at the time of its alleged organization, on the ground that the town *de facto* included the lands east of Biscayne Bay.

Upon certiorari to the Supreme Court of the United States, the judgment of the Circuit Court of Appeals was reversed in *Ocean Beach Heights, Inc.* v. *Brown-Crummer Investment Company* case, 302 U. S. 614, 619, and it was held, under the authority of *Town of Enterprise* v. *State, supra,* that " 'an attempt to incorporate two distinct detached tracts of land under one government is unauthorized and void * * *' " and that the lands east of Biscayne Bay were not subject to taxes for the payment of bonds issued by the Town of North Miami, on the ground that "in the absence of a law authorizing the creation of a municipality *de jure,* there can be none *de facto*".

The Circuit Court of Appeals in the present case held that this Court in the *Ocean Beach Heights, Inc.* case, *supra,* did no more than "adjudge that the east side property was never lawfully included in the town and could not be taxed by it" (R. 139). This was error because this Court, in order to reverse the Circuit Court of Appeals and deny the relief sought by the bondholders, had first to determine the status of the municipality. It found from the

proof that the original attempt to incorporate the Town of North Miami was an effort to incorporate two distinct detached tracts of land under one government, one tract on each side of Biscayne Bay. It then held that such an attempt under the statutes construed by the Supreme Court of Florida in *Town of Enterprise* v. *State, supra*, and *Leatherman* v. *Alta Cliff Company, supra*, was unathorized and void. Having found that there was no law authorizing the creation of the Town of North Miami *de jure*, it followed, and this Court so held, that under applicable Florida decisions there could be no town *de facto*. While the relief thereby granted, or denied, concerned only one of the two non-contiguous tracts, the relief sought by the bondholders necessarily compelled an adjudication of the non-validity of the municipal organization as a whole. An adjudication that as to the lands east of Biscayne Bay there was no municipality *de facto* for the want of a law authorizing the creation of a municipality *de jure*, was an adjudication that the other non-contiguous tract on the west side of Biscayne Bay was not a municipality *de facto*. The established rule is that if the former action be the same as the present, then every matter of fact and of law that was necessarily involved in the consideration of the former issue should be conclusive upon the present. *Nalle* v. *Oyster*, 230 U. S. 165.

That this is a logical deduction from the opinion of this Court in the *Ocean Beach Heights* case, *supra*, is borne out by the petition of the Brown-Crummer Investment Company for a rehearing which this Court denied. *Ocean Beach Heights, Inc.* v. *Brown-Crummer Investment Company* (Mem.), 303 U. S. 666. In that petition it was urged:

> "* * * If, as this Court now holds, the two tracts of land separated by the bay were 'detached tracts' within the meaning of the statute, *Enterprise* v. *State* would have necessitated the further conclusion that the attempted incorporation was 'unathorized and void'

and 'no municipal government came into existence or operation' * * *'' (Petition for rehearing, Supreme Court of the United States, October term 1937, No. 10, page 2).

"* * * For, as held in *Enterprise* v. *State*, incorporation under such circumstances was void, the municipality never came into existence and both tracts were similarly affected." (*Ibid*, page 3.)

In *Heyward* v. *Hall*, 144 Fla. 377, certain owners of land west of Biscayne Bay asked for an injunction against the levy of municipal taxes on their property by the Town of North Miami, alleging that there was no municipality in legal existence *de jure* or *de facto*, "because the general statute under which the alleged incorporation was attemped * * * is unconstitutional and void, and because the proceedings to incorporate the non-contiguous tracts of land, entirely separated by Biscayne Bay, was unathorized by the general statute and void". The judgment of ouster was not pled. From a decree in favor of the plaintiffs an appeal was taken to the Supreme Court of Florida, which reversed the lower court, directing that the bill of complaint be *dismissed* on the ground that under these allegations the proper remedy, if any, was *quo warranto*. Although the pleadings, the issue presented, and the holding of the Supreme Court were in no way dependent upon the interpretation of the *Enterprise, Mahood, Leatherman* and *Ocean Beach Heights* cases, *supra*, the Florida court gave its views on the scope of said cases. This *obiter dicta* on its face does lend color to the conclusion of the Circuit Court of Appeals in the instant case. However, it is submitted that when such *dicta* is properly analyzed, it is clear that the Florida court was considering those cases from the standpoint of the problem then presented, which is wholly unlike the issue here involved, and that such explanation in no way impairs the holdings and the legal

principles discussed therein as they apply to the instant case. In any event, such *dicta* should not be followed by the federal courts for the reasons advanced below. (See heading III).

The conclusion reached by the Circuit Court of Appeals in the instant case would have been proper *if the lands on the east side had been sought to be included within the boundaries of a municipality already existing on the west side. But this was not the case.* The original venture by which the inhabitants or registered voters of the east and west sides of Biscayne Bay attempted to incorporate the town was joint and mutual. When the basis of the decision of this Court was that the very attempt to incorporate was void, the decision is as applicable to the west side as to the east side tract. Otherwise, undue preference is granted to whichever side is involved in the first proceedings to invalidate the original attempt to incorporate, and an unjustifiable burden imposed on the other side which defers action.

The Circuit Court of Appeals' holding that there is a *de facto* municipality on the west side requires the substitution of: (1) A different set of voters participating; and (2) different boundaries, than those actually involved in the original attempt to incorporate.

If it be conceded for the sake of argument that the registered voters on the west tract could have organized a *de jure* municipality as to the west tract and a *de facto* municipality, at least, as to the west tract (which is impossible under the *Town of Enterprise* case) if they by themselves had reached out and attempted to include the east tract within the town, *neither could have been done jointly with the registered voters of the east tract.* It is submitted that the Court can not and should not *now* substitute different parties with different motives for the purpose of upholding the bond issues in question.

If the original attempt at incorporation was void *ab initio* as to the lands east of the bay, it necessarily was void *ab initio* as to the lands west of the bay. An attempt which is void is void in whole, not merely in part. This is established by the following syllogism:

> An original attempt to incorporate two distinct detached tracts of land as corporate territory, under one government, is unauthorized and void;
>
> The original effort to incorporate the Town of North Miami consisted of an attempt to incorporate two distinct detached tracts of land as corporate territory under one government;
>
> Therefore, the original attempt to incorporate the Town of North Miami was void.

It follows then that the holding of the Circuit Court of Appeals in the present case is in direct conflict with the law adjudicated by the Supreme Court of Florida and this Court in a case between the same parties and their privies upon the same issues and involving the same principle of law and that such law, not having been really impaired by subsequent Florida decisions, is now conclusive as to the issues raised in this case. See:

Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103;

West v. *American T. & T. Co.*, 311 U. S. 223;

Moore v. *Illinois Central R. Co.*, 311 U. S. 643.

III. The Circuit Court of Appeals holding that there is a municipal corporation de facto as to lands west of Biscayne Bay is based on Obiter Dicta in conflict with adjudicated legal principles and inapplicable to the issue involved.

In its opinion, the Circuit Court of Appeals stated:

> "• • • The municipality west of the Bay has continued to function ever since, and has repeatedly been recognized by the legislature and the courts as an existing municipality. • • •" (R. 139).

This idea was first announced by the Circuit Court of Appeals in *Horigan* v. *Heyward*, 98 F. (2d) 433, 435, and later repeated by the Supreme Court of Florida in *Heyward* v. *Hall, supra.*

A brief analysis shows that in both cases, *supra*, this is mere *obiter dicta* and should not be controlling or persuasive in the instant case.

In *Horigan* v. *Heyward, supra,* there was motion to quash a writ of mandamus brought by a bondholder on a judgment against the purported Town of North Maimi, the sustaining of which by the lower court was predicated upon its taking judicial notice of the *Town of Enterprise* case and the *Ocean Beach Heights, Inc.*, case, *supra.* There the judgment of ouster was not pled and the Circuit Court of Appeals reversed the lower court on the ground that the town and its officers, not having denied the existence of the town, it was without authority to go outside the issues presented by the record to inquire whether the town had a lawful existence. In other words, the issue whether there was a valid municipality was not presented to the Court by the matter before it. It follows, therefore, that the ensuing discussion of the town's *de jure* or *de facto* existence is mere *obiter dicta.*

In *Heyward* v. *Hall, supra,* the Supreme Court of Florida's discussion of the *de facto* existence of the town on the basis of legislative and judicial recognition and the exercising of municipal functions was *obiter dicta* for reasons similar to those given above in connection with the Court's discussion of the scope of previous decisions. The Court said: "Plaintiffs cannot in this proceeding challenge the legal existence of the municipality whether it be a *de jure* or *de facto* municipality."

It is submitted that under the implications of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, Federal courts are not bound to accept local *obiter dicta* (*Carroll* v. *Carroll,* 16 How.

(U. S.) 275), especially when such *dicta* is in conflict with applicable adjudicated principles of local law. See *Parker Bros.* v. *Fagan*, 68 F. (2d) 616, (cert. denied, 292 U. S. 638); *Louisville Trust Co.* v. *National Bank*, 3 Fed. Supp. 909, reversed on grounds in 67 F. (2d) 97, (cert. denied, 291 U. S. 665). If local *dicta* is ever persuasive data to be regarded by the Federal court in dealing with local matters of common law or statute, such should be confined to "considered *dicta*". See: *Hawkes* v. *Hamill*, 288 U. S. 52, 58-59. Even then, if such considered *dicta* is in conflict with applicable adjudicated principles of local law, such should be received with extreme caution. See: *Yoder* v. *Nu-Enamel Corp.*, 117 F. (2d) 488, 489.

However, assuming that it is the law in Florida that a *de facto* municipality may be established by legislative and judicial recognition and the exercising of municipal functions, is it applicable in the instant case? The bonds here involved were issued in 1927, 1928 and 1929.

Was Chapter 13103, Laws of Florida, Sp. Acts 1927, enacted subsequent to the issue of $175,000 general improvement bonds, changing the name of the Town of Miami Shores to Town of North Miami, effective upon ratification by a majority vote of the qualified electors voting at an election, sufficient legislative recognition to operate retroactively and establish a *de facto* municipality with power to issue bonds in violation of a statute (see appendix, p. 25) only by resorting to validation proceedings? It was certainly not sufficient as to lands then included in the municipality east of Biscayne Bay. See: *Mahood* v. *State, supra*; *Leatherman* v. *Alta Cliff Co., supra*, (appendix, p. 25).

Also, was Chapter 14237, Laws of Florida, Sp. Acts 1929, validating and confirming (effective on approval of a majority vote of qualified electors voting at a special election) the action of the Town Council of the "Town of Miami Shores" in the expenditure of funds derived from

the sale of general improvement bonds, dated January 1, 1927, where such expenditures had been for any municipal purpose, sufficient legislative recognition to establish a *de facto* municipality as to these bonds? (Appendix, p. 25).

The answer to this inquiry is found in the case of *City of Winter Haven* v. *A. M. Klemm & Son*, 132 Fla. 334, decided April 5, 1938, wherein the Supreme Court of Florida stated: "There was no statutory validation or incorporation in the North Miami case".

Is the 1935 decision of the Supreme Court of Florida in *Town of North Miami* v. *Travis Co.*, 118 Fla. 879, sustaining a motion to strike certain paragraphs in a bill of complaint which sought to enjoin the expenditure of certain municipal revenue in 1932-1933 and 1933-1934 for purposes other than the payment of bonded indebtedness, sufficient judicial recognition to establish a *de facto* municipality as to these bonds?

The discussion of the *Mahood, Leatherman, Ocean Beach Heights, Horigan* and *Heyward* cases above makes it unnecessary to labor the obvious fact that these cases do not contain judicial recognition of the existence of a *de facto* municipality as of the time the bonds were issued. So also, these cases refute the theory of creation of a *de facto* municipality by the exercising of municipal functions.

Furthermore, the power of a municipal corporation to make negotiable securities is determined by the facts and the law existing at the time the securities were issued. See:

Zane v. *Hamilton County*, 189 U. S. 370;
Gelpcke v. *Dubuque*, 1 Wall. (U. S.) 175;
Loeb v. *Trustees, Columbia Twp.*, 179 U. S. 472, 492;
Douglas v. *Pike County*, 101 U. S. 679.

The *Town of Enterprise* case decided in 1892 was the controlling law in Florida in 1926, when the attempt by the inhabitants of the entire area to incorporate detached tracts

"A" on the east side of Biscayne Bay and "B" on the west side of Biscayne Bay under one government was made. It was the law in 1927, 1928 and 1929 when the bonds in question were issued. It was still the law of Florida on January 17, 1938, when this Court decided the *Ocean Beach Heights, Inc.*, case involving the same facts, the same principle of law and between the same parties or their privies.

It must follow then that neither the legislature nor the courts nor the purported officers of the town "cured what never had life enough to be sick".

Conclusion.

For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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